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The Rule of Law and Public Safety
in Contemporary South Africa

Dawid P. De Villiers

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The Rule of Law and Public
Safety in Contemporary
South Africa

(The Second L.C. Steyn
Memorial Lecture at the
Randse Afrikaanse Universiteit,
Johannesburg)

Dawid P. De Villiers

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"Law ... regulates the relations of power within a people in accordance with the ideal of justice which resides in the community of that people, and the ultimate source of which is belief in divine justice."

SOHM: Institutes, Intro. 1 & 7

PREFACE

Senator George McGovern, one of the most liberal members of the Senate and Democratic Presidential candidate in 1972, said recently in Johannesburg on his first visit to Africa:

I have been struck during this visit that African countries are struggling with an issue which we in the United States have been grappling with since our nation was founded 200 years ago: the problem of maintaining security and stability on the one hand while advancing freedom and justice on the other.

Dawid (David) de Villiers, a supporter of the conservative National Party, which rules South Africa, has been wrestling with this problem as it applies to his own country. His scholarly analysis, printed in these pages in translation from Afrikaans, is the first thoughtful and major challenge to the present South African security laws made by someone who can undeniably be described as a top flight establishment Afrikaner.

The issue of freedom of the press and the integrity of the courts demand eternal vigilance. Dawid de Villiers' address, given as the L.C. Steyn Second Memorial Lecture at the Faculty of Law at the Randse Afrikaans Universiteit on April 25, 1979, is a major effort to strengthen that integrity.

He looks at the experience of ancient Rome, the flagrant disregard of civil rights by the American FBI, as exposed by the Church Committee, and to the close analogue of Israel, trying to achieve a democratic state under conditions of almost constant tension.

"Lang" (Long) Dawid, as he is known to his friends because of his height, was born in the attractive Cape Province town of Paarl ("pearl" in Afrikaans) sixty-one years ago. He is married, has four children, and lives in Cape Town.

His B.A. and LL.D. degrees from Stellenbosch University were both awarded cum laude. In 1977, Cape Town University awarded him an Honorary LL.D.

Dawid de Villiers first came to public notice as the senior counsel and leader of the South African legal team on the South West Africa case before the International Court at the Hague. He was praised for his role in winning the case. But in defending much of South African practice, he took a critical look at his country, and at South African law in particular, and found them disturbing from a human rights perspective.

Dawid de Villiers plays many constructive roles in his society. He has twice acted as a Supreme Court judge, has been a delegate to the United Nations on the South West issue, and has been Chairman of the General Bar Council of South Africa. He has also been Chairman of the South African Press Association, President of the Newspaper Union, and is a director of four leading corporations.

In addition, he is Chairman of the Western Regional Board of the Urban Foundation, directed to improving the quality of life for Africans, Coloured people, and Asians. For the last ten years he has been Chairman of The Joint Management Committee of the United States-South African Leader Exchange Program, which pioneered dialogue between the two countries and, perhaps more important, pioneered serious and frank discussions among South Africans of all races. He is involved in USSALEP's Careers Development Program, which is providing skilled training that is moving Africans into top managerial and professional positions.

Dawid de Villiers' principal position is Managing Director of Nasionale Pers, the most influential Afrikaans publishing group, which owns Die Burger and Beeld, daily morning newspapers in Cape Town and Johannesburg, respectively. It publishes other newspapers and magazines, and has a book division.

The Afrikaans press was absolutely crucial to the successful campaign in May, 1979, to persuade the government to withdraw legislation that, so the press felt, would have muzzled investigative reporting such as the exposé by the Sunday Express and other English-language newspapers in the so-called "muldergate" or Department of Information scandal. This affair led to the change of Prime Ministers and, later, to the resignation of the State President, John Vorster.

The conservative organization of Afrikaans university students and the staff of the government-run television and radio networks also opposed the legislation.

The effect of the bill would have, in recent American terms, required reporters Woodward and Bernstein to report any Watergate corruption or malfeasance to Attorney General John Mitchell or to someone appointed by President Nixon.

The rule of law and of the courts (when not bypassed by Parliament through administrative devices) is one of the bulwarks of South Africa's democratic oligarchy. That circumstance, and the greatest freedom of the press on the African continent, are what keep South Africa from fitting into most definitions of a police state.

But pressure on this freedom never seems to end. Although "there can be little doubt that public pressure played a bit part in Prime Minister P.W. Botha's last-minute change of mind on the Advocate-General Bill's press gag section," to quote the Sunday

Times editorial of June 17, 1979, Parliament did pass the Police Amendment Act, which seriously limits investigative reporters in the same way that the prisons-reporting law has cut down markedly on exposés of wrong-doing in prisons.

Percy Qoboza, the editor of the most important black newspaper, editorialized as well that the reprieve from the bill "can be taken as a sign that the Prime Minister may have after all listened to the voices of protest raised against this most unwise piece of legislation," and asks with cautious optimism: "Have the forces of reason begun to operate at last in South Africa?" (Post, June 17, 1979.)

Since the address by Dawid de Villiers, some changes have taken place, perhaps as a reaction to his words. Piet Koornhof, the second senior cabinet minister and an important Transvaal politician, told me, "Ned, the most important aspect of the cabinet shakeup (of June, 1979) was the separation of the ministerial responsibilities for Justice, from the Police and Prisons." In fact, a number of influential Afrikaner Nationalists have said that if the responsibilities had not all rested on one man, the dreadful Steve Biko death would never have taken place. The circumstances of Biko's death and the subsequent inquiry -- something that doesn't take place in most countries of the world when a prisoner dies in police custody -- shocked most Afrikaners and did irreparable damage to South Africa's already tarnished reputation around the world.

Dawid de Villiers' thoughtful and calm exposition of how to provide civil liberties in a country where interracial dialogue and cooperation are so urgently needed, in a period of increasing urban terrorism and guerrilla attacks, is more than a timely address. It is an act of citizen statemanship that is characteristic of his deep concern for the future of all South Africans. I would have expected no less from Dawid de Villiers, one of the finest people I have ever known regardless of race.

President Kennedy observed that:

"Those who create power make an indispensable contribution to the Nation's greatness," but that "those who question power make a contribution just as indispensable...for they determine whether we use power or power uses us."

Dawid de Villiers' questioning of how power is used is a seminal contribution to the prospects of peaceful change to a just society in South Africa.

Ned Munger

THE RULE OF LAW AND PUBLIC SAFETY
IN CONTEMPORARY SOUTH AFRICA

It is a great honor for me to deliver the second L.C. Steyn Memorial Lecture, in the footsteps of the Chief Justice and in memory of a man for whom I had the greatest respect, both as a jurist and as a person.

L.C. Steyn achieved distinction in various spheres. I limit myself this evening to a few words on his career as a judge, bearing in mind that, as an advocate, I had the privilege of frequently appearing before him in the Appellate Division.

He excelled in this position. No litigant or advocate could demand more devoted and expert attention than that consistently received from L.C. Steyn. This was true for every aspect of a case or an argument, however minor, that came before him, covering his own preparation, the hearing of the case in court and then finally the way he dealt with it in his judgment. One could not help being aware all the time of his undivided attention, of the high standards of intellect and juristic insight that never wavered, and of the spirit of quiet courtesy in which all this was given.

A sector of the Bar was put to shame, for they initially contended that he would not be a suitable judge for lack of experience as a practicing advocate. In course of time the body of advocates as a whole paid grateful tribute, which I wish to confirm tonight: he truly graced the profession.

THE SUBJECT

The oft-used expression "the Rule of Law" denotes the concept not only of the supremacy of the law, but also of the conferring and maintenance by the legal system of certain fundamental rights. These rights include protection against arbitrary exercise of authority, arbitrary punishment and arbitrary imprisonment, or positively stated, equality before the law for all, and adjudication by unbiased and independent courts.

In a formal sense there is complete supremacy of the law in South Africa. Nobody is above the law. All exercise of authority must be authorized either by the common law or by a

statutory enactment. Even the supreme legislative body, Parliament, is bound by certain legal rules concerning its constitution and manner of functioning.

The practical situation regarding the fundamental rights is another matter. Arising from the turbulences in Africa and their effects on our southern sub-continent, successive governments have resorted to methods outside of the normal administration of justice, the express objective in each case being the maintenance and protection of "public safety" (I include in the term the safety of the state as well as that of the public).

In a formal legal sense, this type of action was properly authorized, namely, by parliamentary legislation. At the same time there can be no doubt that the fundamental rights under discussion are seriously affected. From the point of view of the individual who is detained or restricted without trial (and, in his view, without justification), it can hardly be a consolation that these steps were authorized by Parliamentary enactment. For others, questions and concern arise about the adequacy of control and the dangers of abuse, coupled at the same time with appreciation of the considerations of public interest -- the safety of all of us -- which are contemplated by the system.

Questions which arise for penetrating analysis include the following:

What is the effect on our legal heritage?

Does the present system achieve optimum results for our public order, including, in particular, public safety?

If not, what can or should be done about it?

Although certain aspects of the subject are regularly discussed in legal publications and by jurists, it will be clear that the subject as just defined is not limited to purely legal content. Nevertheless, it seems to me that the expertise of a jurist is required for detailed analysis and proper evaluation. He should, however, recognize and respect certain limitations:

- (a) It does not help to postulate a theoretical ideal and then summarily to condemn everything that deviates from it: for purposes of a value judgment, motivating facts and circumstances must duly be taken into account.
- (b) It follows that before complete advice can be given to a community as to what would constitute a sound overall arrangement in its case, the expertise of others will have to be added to that of the jurist.

But someone must make a start, for otherwise a matter of the utmost public importance could go by default: and it seems appropriate that a jurist should try to set the stage.

LEGAL-HISTORICAL BACKGROUND

This aspect is large enough on its own for a thesis. The time at my disposal permits only a few broad observations.

The common law principles concerning the Rule of Law undoubtedly form part of what Prof. Kunkel termed "timeless values in our legal culture."¹

The accent, which is often correctly laid on the value of the British contribution to our legal heritage in this respect, may create the mistaken impression that the infusion came only from that side, and that it had to supplement a deficiency on the Roman-Dutch side. The opposite is true: the heritage decidedly comes from both quarters, and in more or less equal measure.

The emphasis on the British contribution probably derives from the fact that British constitutional law and governmental institutions took over in the four colonies (which later became the Union) at the time of their inception, whilst the private law remained mainly Roman-Dutch (specifically as a result of a principle of British constitutional law).² It was hardly surprising that as from that time reference should be made to the pride of the British nation in the form of Magna Carta, The Petition of Right, The Bill of Rights and the Habeas Corpus laws when the inviolability of personal freedom, life, limb and property was under discussion.

This, however, does not detract from the fact that the Roman-Dutch law confers upon every person rights in respect of life, limb, freedom, reputation, good name and property, which can in general be upheld universally.³ A pertinent example is the legal remedy against arbitrary or unlawful detention of a person: the English writ of habeas corpus has a very similar counterpart in the Roman-Dutch interdictum de homine libero exhibendo (writ to deliver a man up free).⁴ There was in the Netherlands a constitutional document similar to the English Magna Carta, the Blijde Inkomste of 1356,⁵ although it seems to have caused less stir. And the Roman-Dutch writer Hugo de Groot was probably the greatest of all champions of the ideal of a criterion based on Natural Law, against which all governmental conduct, including legislation, could be legally tested.

It is therefore not surprising that national consciousness in respect of personal rights and liberties was just as strong on the part of the Dutch Free Burghers at the Cape as on that of their British counterparts, the Pilgrim Fathers and others, who at a later stage entrenched the fundamental rights of Magna Carta, etc., in the famous Amendments to the American Constitution. Concerning the community at the Cape, we all know from our school days that the history of the rule of the V.O.C. was largely one of resistance and petitions against what the citizens regarded as arbitrary, exploiting and oppressive conduct on the part of the corrupt officials of an autocratic

authority. We also know that this disposition was again in evidence later in resistance by the same community to what it regarded as violations of its basic rights by the British colonial authorities.

Throughout our legal history, both on the British and continental sides, one can hardly speak of static situations in regard to the fundamental rights and liberties. It is a history of action and reaction, and the most important milestones in respect of enunciation and recognition came precisely after fierce struggle resulting from the disregard and negation of those rights and freedoms. Magna Carta is a famous example. It was initially forced upon an unwilling King John by the barons and accepted by him on June 15, 1215.⁶ A standard work on British constitutional history states:

On the whole, the Charter contains little that is absolutely new. It is restorative. John in these last years has been breaking the law; therefore the law must be defined and set in writing.⁷

The setting in writing in such a solemn document would naturally be very useful in confrontations with later kings who might have thoughts of overstepping the mark. The drama was heightened in that John persuaded the Pope to annul the Magna Carta during the same year. The barons started out on dethronement action, but John died, and under his successor the Magna Carta was reinstated shortly afterwards, with a few amendments.⁸

THE ROMAN PERIOD

Historians give the year 27 B.C. as the end of the Republican era and the beginning of the Empire. This was, however, not what the Romans at the time understood from the events of that year. Octavian, who now became Augustus, announced to the Senate and the people that he was relinquishing the emergency powers which he had exercised during the time of the triumvirate and thereafter, and that in so doing he was restoring the Republican constitution - but with a few minor qualifications. As princeps or first citizen he was taking over certain magistral functions, because it was necessary for the maintenance of public order and the ending of the instability which had afflicted the Republic for some time. He only asked to be clothed with the powers of the tribunes and proconsuls: this broadly meant the power to summon the Senate and control of the administration of justice and of the affairs of the border provinces. There were additional powers, all granted almost unobtrusively, to declare war and peace, to make treaties and to exert a measure of influence on the composition of the Senate. He definitely did not want legislative power, nor the powers of the censors, and above all not the title of "Emperor."⁹ An influential

propaganda campaign, supported even by Livy, Horace and Virgil, was set up in favor of the arrangement.¹⁰ Not everyone was without concern: Tacitus, who idealised the old Republic, later wrote rather ruefully:

Augustus was wholly unopposed, for the boldest spirits had fallen in battle, or in the proscription, while the remaining ... preferred the safety of the present to the dangerous past.¹¹

How did matters develop in practice? Under Augustus all went well: he raised the stature of Rome with graceful new buildings, encouraged religion and laid the foundations for an efficient administration and a relatively enduring peace.¹² This lasted for 41 years.

Then came Tiberius, a good administrator, but a brutal tyrant, full of suspicion that others were plotting his downfall: according to Suetonius, not a day passed without an execution and not even holidays were considered sacred. "The word of no informer was doubted."¹³

His successor was Caligula, who claimed the right to be addressed as a god and proposed that his horse be elected consul.¹⁴ After he was assassinated, Claudius proved to be a sensible and steady ruler for about 13 years, but then he was poisoned by his fourth wife Agrippina, so that her son by a previous marriage, Nero, could succeed him. Nero lost no time in poisoning his half-brother and rival, Britannicus. After the failure of various indirect murder attempts on his mother, he accused her of conspiring against him and had her assassinated.¹⁵ Other incidents in Nero's career are well-known. Perhaps the most illuminating is his enactment making attendance compulsory at concerts where he sang and played upon the lyre. Suetonius wrote that no one was allowed to leave the theatre, even for the most urgent of reasons. It was said that some women gave birth to children there, while others feigned death and were carried out as if for burial.¹⁶

After a revolt, Nero committed suicide. Within a year, Rome had four emperors, each of whom was pushed to the fore by factions of the armed forces and the first three were then in turn removed by similar methods.¹⁷ This had all happened within little more than a hundred years from the beginning of the Principate (of which 41 years were under Augustus).

A continual process of alternation between good and weak Emperors followed. During the rule of five successive benevolent Emperors (Nerva, Grajan, Hadrian, Antoninus Pius and Marcus Aurelius) being approximately the second century A.D. until the year 180, the Roman empire reached its zenith. This inter alia included the expansion of the borders of the Empire to an all-time maximum, and the classical period or golden era of the development and refinement of Roman private law, especially as a result of the role played by the great jurists and

jurisprudents, with the encouragement and co-operation of the Emperors.¹⁸

But then followed rather low depths, which included:

- The execution, at the command of the Emperor Caracalla, in 212 A.D. of Papinian, who was widely regarded as the greatest jurist of them all, because, so it is said, he refused to compose a justification of the execution by Caracalla of his brother and co-regent, Geta. The famous, though perhaps mythical, retort of Papinian to the Emperor is said to have been:

it is not so easy to justify murder as to commit it.¹⁹

- Within 50 years from 235 A.D., there were 20 Emperors and an assortment of usurpers in various parts of the Empire, of whom all except two met with a violent end - almost all of them were brought to power by soldiers, and were subsequently assassinated by other soldiers, mostly for their own gain.²⁰ The system obviously contained the roots of its own destruction.

In the meantime, the constitutional power situation had not remained unchanged since the time of Augustus. The national assembly, which was the only legitimate legislature in the Republic, was in course of time not convened any longer. The Senate was used as a legislative organ; but since the time that Domitian had assumed a permanent censorship (84 or 85 A.D.) his successors had simply continued to exercise this function, and this had the practical effect of conferring control over the senate on the princeps.²¹ Towards the middle of the second century A.D. it was accepted that the princeps had legislative powers.²² Two famous propositions by jurists make their appearance:

Gaius²³ states that there had never been any doubt that an enactment (constitutio) of the princeps "legis vicem obtineat" had acquired the force of a law.

Ulpianus²⁴ says: "Quod principi placuit, legis habet vigorem" (what pleases the princeps has the force of a law).

The writers offered as explanation that the people had by law invested the princeps with his authority (imperium) which must presumably include legislative power. This explanation is plainly without foundation. It rather seems as if the writers simply gave effect to the practical situation which had arisen through the gradual accumulation of various powers in the hands of the princeps: since no one could effectively contest his authority, his own interferences with the law had to be regarded as binding.²⁵

In a desperate attempt to bring to an end the civil wars and foreign attacks and to impose some form of stability, a new disposition was created from about 300 A.D. onwards by Diocletian and his successor Constantine, known as the Dominate amongst contemporary historians. The obfuscation of the Principate was now cast aside, and in its place there appeared an absolute and undisguised monarchy with a bureaucratic administration and characterized by a ruthless limitation of personal freedom in the interests of the state.²⁶ Apparently the idea was to prevent usurpations by surrounding the imperial dignity with such a hedge of divinity that it should appear beyond the reach of any ordinary mortal.²⁷

Legal theory, too, was adapted so as to regard the imperial authority as being received from God.²⁸ The emperor appeared in public only in the most richly ornamented robes and wearing a pearl studded diadem - the ancient symbol of oriental royalty; and anyone who approached him had to prostrate himself on the ground.²⁹

There was, moreover, no more camouflage of the emperor's legislative power.³⁰ Indeed, Imperial enactments, now in the formal sense, became the only form of legislation known to the Dominate: what had previously been the proposal of the princeps for the issue of a senatus consultum now became an imperial statute which was merely promulgated in the Senate.³¹

What were the consequences?

They were briefly:

- (a) The development of the private law was stifled. The earlier co-operation between emperor and jurist, on a footing of virtual equality, had fallen away, the emperor now relying only on his bureaucracy.³²
- (b) The bureaucracy grew enormously, acquiring an increasingly military appearance.³³
- (c) Taxes and tributes were levied with increasing severity, and while inflation soared, these measures had a crippling effect on the economy.³⁴
- (d) The practice of corruption had assumed frightening proportions, especially in the areas of the gathering of taxes and tributes,³⁵ and even in sections of the judicature, particularly in the courts of the governors, who were relatively poorly paid.³⁶

In such decadent circumstances, the onslaughts on the Empire could not be repulsed in the long run. When the emperor Justinian in the 6th century A.D. attempted to regain the erstwhile glory, his efforts applied only to the eastern part of the Empire - the western part had by then already been lost. In

other areas Justinian's achievements were more or less ephemeral; but his indestructible contribution was the codification of the Roman private law in the Corpus Juris Civilis. He accomplished this by once again utilizing the most eminent jurists of his time - Irebonian, together with teachers at the law schools of Beirut and Constantinople, and prominent advocates at the court of the latter. Thus even some of the spirit of the classical era was recovered and a heritage left which could not be destroyed by the processes of corruption and abuse of power.

INTELLIGENCE AGENCIES IN THE U.S.A.

Recent history in the world's greatest democracy, the United States of America, is very relevant to certain aspects of our subject.

Investigations of the last few years have revealed that almost all the intelligence agencies of the Federal Government had over a considerable period been guilty of rather shocking malpractices and abuses of power. This applies particularly to the two large organizations, the Federal Bureau of Investigation (F.B.I.) and the Central Intelligence Agency (C.I.A.) and to a lesser extent to other organizations like military intelligence divisions, the National Security Agency (N.S.A.) and the Internal Revenue Service (I.R.S.).

One group of chroniclers comments as follows:³⁷

For more than twenty-five years, the Congress and the press have given the executive branch virtually a free hand to carry on whatever clandestine operations it chose. The checks and balances that were written into the American system by the founding fathers were bypassed. The legislature, the courts, the media, and public opinion were not a real restraint on the C.I.A. because none of the political checkers or balancers knew what the secret agency was doing.

As will appear, the same could as well have been said of the F.B.I., with reference to a longer period of time. To limit the ambit of this enquiry, I confine myself to aspects of the history and the findings relating to the latter organization, which is the important one for the purposes of this lecture.³⁸

Until 1971 the nature and scope of the activities of the F.B.I. remained largely secret. Its predecessor, the Bureau of Investigation, was established before the First World War, at first solely for the purposes of criminal investigation. Shortly before, during and immediately after the war, it was given intelligence tasks to combat possible espionage and sabotage in the United States. Nearly 60,000 people were detained during the war. The arrest of about 10,000 American radicals after the

war, without warrant or "probable cause" - known as the Palmer Raids - elicited vehement criticism, and the Bureau fell into public disfavor. In 1924 a new Attorney-General (i.e., Minister of Justice) Harlan Fiske Stone introduced reform and laid down stringent rules that the Bureau should in future again be confined to the combating of crime and should not concern itself with the political or other opinions of individuals.³⁹ A man widely respected for his administrative skills and honesty, J. Edgar Hoover, was appointed head of the reorganized Bureau.⁴⁰ For the next decade or so Hoover and the Bureau strictly observed the imposed limitations.^{40a}

In 1936 a new era began. President Roosevelt, concerned at ominous war signs, gave secret instructions to Hoover that the Bureau should monitor "subversive activities in the United States, in particular Fascism and Communism."⁴¹ When war broke out in 1939, Roosevelt in a press statement instructed local law enforcement agencies to turn over all information regarding "espionage, counterespionage, sabotage ... and violations of the neutrality laws" to the F.B.I. It was the only public indication during the war that the F.B.I. had again been given intelligence tasks. No legislative authority was sought, and in the atmosphere of concern about the war Congress was in no mood to quibble or even to insist on thorough supervision on its own part,⁴² the more so since Hoover, when he approached Congress in 1941 for the appropriation of funds, gave the assurance that:

if the national emergency should terminate, the structure dealing with national defense can immediately be discontinued or very materially curtailed according to the wishes of Congress.⁴³

During the war, intelligence operations were undertaken by the Bureau on a huge scale, but they were conducted in secret and nobody supervised. Halperin states:

Hoover had established an image of himself and the bureau in the public consciousness as incorruptible, efficient and above reproach.⁴⁴

The President, members of the Government and Congress therefore hesitated to challenge a man whose pronouncements on communism were received as gospel. And fear played a part, since he from time to time provided the President and members of the Government with derogatory information from files on their political opponents, and they could not know how much of their own private lives he might possibly have on record.⁴⁵

At the end of the Second World War nothing came of the promised termination of the Bureau's political functions. With a view to the cold war, President Truman authorized continuation and the Bureau in this respect became the internal equivalent of the C.I.A., which had been established by Congressional legislation in 1947.⁴⁶

During the McCarthy era the Bureau played a very active role, and inter alia listed nearly 230,000 names of persons who, because of their suspected communist disposition or connections, were to be considered a national security risk in times of crisis and would then have to be interned.⁴⁷ Such plans were never put into operation, for the McCarthy hysteria subsided and it came to be realized that the internal communist danger was not nearly as great as Hoover and the Bureau had at first intimated.⁴⁸ Nevertheless, the Bureau continued with a secret project COINTELPRO, aimed at disrupting, exposing, discrediting and otherwise neutralizing the United States Communist Party and organizations considered by the Bureau to be related.⁴⁹ In the 1960s its attention was directed particularly at Civil Rights organizations,⁵⁰ and somewhat later at a so-called "new breed of subversive."⁵¹ As from 1971 the F.B.I.'s authority came to be questioned; in 1972 Hoover died; and afterwards various developments led to the Church Committee's investigation in 1975-6.

I state only the gist of some of the more important findings:

- (a) Violating and Ignoring the Law: Throughout the findings runs the thread that the Bureau, in the all-prevailing secrecy, elevated itself to being a power above the law, and that its violation and disregard of the law made far-reaching and injurious inroads into the rights and liberties of law-abiding American citizens. For illustration the following:

1. No one in the Bureau ever cared seriously whether their actions were lawful or unlawful. The man in charge of the F.B.I.'s Intelligence Division for 10 years, testified:

Never once did I hear anybody, including myself, raise the question: Is this course of action which we have agreed upon lawful, is it legal, is it ethical or moral? We never gave any thought to this line of reasoning, because we were just naturally pragmatic.⁵²

Another official said:

It was my assumption that what we were doing was justified by what we had to do ... the greater good, the national security.⁵³

2. The question raised was usually not whether a particular action or program was lawful or ethical, but whether it "worked."⁵⁴

3. On some occasions when agency officials were told that a program was illegal, they still permitted it to continue. They justified their conduct in some cases on the ground that the failure of "the enemy" to play by the rules granted them the right to do likewise, and in other cases on the ground that the "national security" permitted programmes that would otherwise be illegal.⁵⁵ President Nixon on an occasion stated:

It is quite obvious that there are certain inherently governmental actions which if undertaken by the sovereign in protection of the interest of the nation's security are lawful but which if undertaken by private persons are not. . . .⁵⁶

One can almost see him in the robes of a Roman emperor during the Dominate!

4. Officials of the intelligence agencies occasionally recognised that certain activities were illegal, but expressed concern only for the danger of being caught -- the so-called "flap potential."⁵⁷
5. A very serious aspect is that there was no proper differentiation between lawful political opposition and criminal behaviour or intent on the part of the person or group against whom action was taken:

The distinction between legal dissent and criminal conduct is easily forgotten.⁵⁸

6. A remarkable example is provided by the Bureau's campaign during the 1960s against Dr. Martin Luther King, Jr. (to which the Church Committee added:

In focusing upon Dr. King, however, it should not be forgotten that the Bureau carried out disruptive activities against hundreds of lesser known American citizens).⁵⁹

The philosophy of King and the organization which he led (the Southern Christian Leadership Conference, or S.C.L.C.) was one of outspoken non-violence. The allegations made by the Bureau that King had communist connections were demonstrably false. The officials regarded him as potentially dangerous because of his leadership qualities in the black civil rights movement. And Hoover was angry because King had on occasion criticized the Bureau. For lengthy periods the Bureau illegally "bugged" King's hotel room, using hidden microphones for tape recording, in attempts to obtain information on his private life which they could use against him. At the stage when King was to receive the 1964 Nobel Peace Prize, the

Bureau not only spread detailed, derogatory reports on him, but also sent a so-called "sterilized" tape to his office with an anonymous letter threatening public revelation of the information on the tapes. The letter ended: ". . . . There is but one way out for you. You know what it is. . . ." Not unreasonably, King and his associates interpreted the message as an effort to induce him to commit suicide.⁶⁰ A vendetta of attempts to discredit King continued until his death.⁶¹ The Church Committee concludes:

The actions taken against Dr. King are indefensible. They represent a sad episode in the dark history of covert actions directed against law-abiding citizens by a law enforcement agency.⁶²

7. Important findings of fact were made not on the basis of objective truth but on "what Hoover wanted to hear." A division of the Bureau submitted a memorandum in 1963 which concluded that alleged efforts of the American Communist Party to exploit black Americans had been "an obvious failure." When Hoover expressed his displeasure and indicated that at this rate they would all be "out on the street," the authors altered the memorandum in order to read almost exactly the opposite. And this was the effect to which Hoover informed Congress the following year.⁶³
- (b) The Excessive Ambit ("Overbreadth") of Intelligence Activity: In its collection of information -- by means of wiretapping, hidden cameras and tape recordings, mail opening and spying by informants -- the Bureau went much further than investigating possible unlawful conduct. It continued with lengthy investigations of organizations which soon proved to be quite lawful. Even where there were aspects of possible illegal activity, a "vacuum cleaner" approach was adopted in order to draw in masses of facts concerning lawful activities.⁶⁴
- (c) Political Abuse of Intelligence Information: Through the use of these methods the Bureau was put in a position to misuse the collected information for the political benefit of Presidents and members of the Administration, and often did so. Information was sometimes gathered for purely political purposes at the specific request of a President. Thus there arose an atmosphere of complicity between members of the Administration and the Bureau, with the possibility of the one blackmailing the other.⁶⁵
- (d) Lack of Effective Control: This deficiency flowed partly from the situation just described, further from the general secrecy and sometimes even from the Administration being deliberately misled by the Bureau. On several occasions it happened that the Bureau was ordered to discontinue a specific activity and then simply continued to pursue it under a different name or in another guise.

- (e) In Conclusion, the Commission found that although a certain measure of secrecy was both necessary and justifiable in the conduct of lawful and proper intelligence activities, this did not warrant the absence of effective control by the legislature and the courts, and that, in the absence of such control, the abuse of power which developed ought to have been foreseen.⁶⁷ The Commission referred to administrative guidelines which had already been issued by Attorney-General Levi,⁶⁸ but considered that these were insufficient. It believed that there should be a comprehensive legislative charter defining and controlling the intelligence and security activities of the Federal Government.⁶⁹

TENDENCIES IN ISRAEL

In its particular circumstances, Israel perpetually finds itself in a state of war or semi-war of varying intensity, accompanied by sabotage and terrorism both within and outside its borders. The Israeli approach and experience in respect of extraordinary security measures can therefore prove very instructive for us in South Africa.

In 1973 Prof. I.M. Rautenbach, the dean of this evening's host faculty, in an article in Die Tydskrif vir Hedendaagse Romeins-Hollandse Reg,⁷⁰ gave a very valuable comparative review of the relevant measures in Israel on South Africa, as they then existed. In January of this year, Prof. Amnon Rubinstein, M.K., on a visit from Israel delivered a lecture at the University of Cape Town's First International Conference on Human Rights, which brought the picture on Israel up to date.⁷¹ One hopes that the lecture will still be published: I have had the privilege of insight into the unpublished text.

I will not repeat the details but wish to refer to certain tendencies in Israel, as they appear from the two reviews.

Until recently, the security system was legally based almost entirely on legislation from the period of the British Mandatory regime, particularly the Defense (Emergency) Regulations of 1945, which conferred very wide powers on the military command to infringe individual liberties with a view to public safety, defense, the maintenance of order and the suppression of insurrection and unrest. The authorized methods included, amongst others,

- * restriction of a person in respect of his own movements, his association or communication with others in business or in organizations, and his participation in the dissemination of news and the propagating of opinions;
- * placing a person under police supervision, and
- * at the top of the ladder, his detention without trial.

Prof. Rubinstein in particular, however, emphasized how these measures were tempered in practice by internal guidelines or instructions issued by the government. A detainee could note an objection with an advisory committee, which in terms of the internal instructions had to be chaired by a judge of the Supreme Court, and had to include as members two representatives of the public, who were not to be state employees. Further, according to the guidelines, a detention

- * had to be of a preventive nature only and was not to be punitive;
- * had to be the only effective method to guard against the danger arising in respect of that particular person; and
- * was not to be aimed at the silencing of non-conformist viewpoints, no matter how extreme these might be.

Now, however, a new dispensation has been brought about by legislation, the Emergency Powers (Detention and Miscellaneous Provisions) Law, in which the Knesset itself builds still further protection into the system. Prof. Rubinstein mentioned in his lecture that the Bill had then already been read for a first time. I have received confirmation from the Israeli Ambassador, Mr. Unna, that the Bill was finally assented to recently. An English text is not yet available, and I therefore have to rely on the information divulged by Prof. Rubinstein in his lecture and kindly supplemented by the Ambassador in oral communications to me.

According to this information, the Act requires, inter alia, that a detainee must be presented to the President of the District Court in the jurisdiction of which he was arrested within 48 hours of his detention, for the ratification, limitation or annulment of the detention order. The detainee is entitled to legal representation. The evidence on which he is detained is only withheld from him if the President is convinced that disclosure may harm the security of the state or the public; the President in any event obtains insight. If the order is ratified, and is still operative after 3 months, the detainee again appears before the President, for reconsideration of his case. The Law extends to the Administered Territories, where most acts of sabotage and terrorism occur.

On the basis of what has been stated Prof. Rubinstein made the following observations in his lecture:

On the one hand, it⁷² has made people more aware of the dangers to internal and external security of the country, and if one couples this with the siege syndrome, one can appreciate the sensitivity to and the awareness of the need to combat terrorism and to have legal defences against sabotage. On the other hand, this permanent state of war and semi-war, paradoxically has the contrary effect of liberalizing Israeli legal institutions. Because Israelis

believe that this war or semi-war situation is not a short-term affair, they think that the country cannot afford the excesses of other countries in time of war. In other words, because we perceive our semi-war situation as a permanent feature of our national life, we have had to regulate, modify, and moderate the measures that would otherwise have been justified by the grave security situation.

And again:

. . . the Israeli experience proves that the suspension of civil liberties which usually accompanies wartime and national-emergency situations is probably overused and overdone. Israel has learned how to cope with an ongoing national-emergency situation without giving up most of what we consider normal peacetime freedoms of expression.⁷³

THE SITUATION IN SOUTH AFRICA

A masterly summary of both the ordinary principles of the Rule of Law as inherited by us and the traditional special qualifications which obtain in a state of emergency was given by Sir James Rose-Innes, Chief Justice of the Union during the First World War, in one of the cases which came before the courts during that period:

One of the features of the English constitution, a feature reproduced in the self-governing dominions is the absolute supremacy of the law. Every subject, high or low, is amenable to the law, but none can be punished save by a properly constituted legal tribunal. If any man's rights of personal liberty or property are threatened, whether by the Government or by a private individual, the Courts are open for his protection. And behind the Courts is ranged the full power of the State to ensure the enforcement of their decrees. But there is an inherent right in every State, as in every individual, to use all means at its disposal to defend itself when its existence is at stake; when the force upon which the Courts depend and upon which the constitution is based is itself challenged. Under such circumstances the State may be compelled by necessity to disregard for a time the ordinary safeguards of liberty in defense of liberty itself, and to substitute for the careful and deliberate procedure of the law a machinery more drastic and speedy in order to cope with an urgent danger. Such a condition of things may be brought about by war, rebellion or civil commotion; and the determination of the State to defend itself is announced by the proclamation of Martial Law. But, in the absence of statutory provision upon the subject -- and none exists here -- such a proclamation clothes the Government with no authority, and invests it with no power which it did not possess before. The right to use all force necessary to protect itself,

whether against external or internal attack, is an inherent right. The proclamation is merely a notification to all concerned that the right in question is about to be exercised and upon certain lines.⁷⁴

The temporary nature of such a special dispensation is evident from the exposition as a whole as well as from the words "for a time," and was again emphasized in judgment of Acting Judge of Appeal (later Chief Justice) Jacob (Jaap) de Villiers:

. . . provided always the measures taken are not in excess of what the occasion demands, and cease with the necessity.⁷⁵

This was in "the good old days," when war, rebellion and civil commotion came and went, or were so to speak more or less bound to place and time. Since the end of the Second World War we have been living in the times of the cold war, the rise of the Third World and sophisticated new revolutionary and terrorist strategies and techniques, which have been conveyed from the communist world to the fighters in a variety of nationalistic and ideological campaigns. The techniques are intentionally of a low intensity character; waging war without a declaration of war and without large concentration of forces; guerilla activity in the countryside, sabotage in the cities; assassinations and bomb explosions; come and go, hit and run; now active then quiet; now in the open then underground; long drawn out, without end. . . .

It is self-evident, that the methods of resisting this kind of onslaught require adaptation to suit the circumstances -- although the resistance would still occur in the exercise of what Sir James Rose-Innes described as "the inherent right in every state . . . to use all means at its disposal to defend itself when its existence is at stake; when the force upon which the Courts depend and upon which the constitution is based is itself challenged."

It can hardly be disputed that South Africa, for well-known reasons, finds itself in such a situation: courts could possibly even begin to take judicial notice of this fact. And whatever course events may take in Rhodesia and South West Africa, there seems to be no prospect of an early conclusion to the situation as far as South Africa is concerned. We have to face up to the logical consequences of this reality, inter alia in the arrangement of our internal dispensation with regard to basic rights and liberties.

On the one hand, it seems to me a logical consequence that the official declaration of a state of emergency would hardly be appropriate with reference to the terrorist onslaught as such -- in contrast with, e.g., cases of internal insurrection on a large scale at a particular point of time. Such a prolonged, official state of emergency would no doubt result in considerable harm to the country's economy and international intercourse, and would thus play into the hands of the aggressors. It follows that it is not

realistic, at least under present circumstances, to prescribe the declaration of a state of emergency as a prerequisite for special methods to combat terrorism and sabotage.

On the other hand, it seems to me to be a logical consequence of equal potency that, upon general realization that the situation is likely to be of long duration, a new, incisive look should be taken at the propriety, efficiency and likely long-term effects of the measures which exist at present.

It is one thing to promulgate emergency measures hastily and under pressure of circumstances, with the prospect of mercifully getting rid of them quite soon again. After all, it should be borne in mind that towards the end of his judgment in the Krohn-case of 1915, Sir James Rose-Innes said:

In no respect can Martial Law be regarded as a good thing; it is at best a lamentable necessity. It imposes a great responsibility upon the executive Government; it operates with inevitable harshness in certain cases, and it saps the political fibre of the people.⁷⁶

He therefore considered that in such war-time circumstances legislation was desirable to regulate the martial law, and particularly to prescribe safeguards against abuse.⁷⁷

It is quite another matter to design legislation as a model structure which is to be kept in being for an indefinite period in the future. The least that can be said of developments in Israel is that the difference was clearly appreciated there. It does not follow that we should blindly adopt their course: circumstances may differ. But it does follow that we should very closely study their system as now amended, in order to learn from it in respect of both the juridicial and the security aspects.

As was the case with Israel, the severest of our special measures is the provision for detention without trial; and in our case this applies in particular to the most extreme variant, viz. solitary confinement for the purposes of interrogation, under section 6 of the Terrorism Act.⁷⁸

The predecessor of this provision was the so-called 90-day provision of 1963.⁷⁹ When introducing the Bill the then Minister of Justice, now the State President,* was outspoken about his distaste for the measure. He said:

I appreciate that is not a provision that is proper in peacetime.⁸⁰

*John Vorster has since resigned, Ed.

Concerning the aspect that the detainee would not have recourse to a legal adviser, the Honourable Minister's words were:

As a lawyer, I realise what I am doing here,

and he added that he was

prepared to do it for the sake of the security of the State, which I believe is at stake here.⁸¹

And then,

Honourable members will also find that habeas corpus is suspended here. It is necessary to do so.⁸²

He quoted a comment of Judge Snyman who had shortly before completed his investigation into the Paarl riots:

. . . the departure from such a principle can never be subscribed to in normal times. . . .⁸³

On the aspect of interrogating a detainee who would be in solitary confinement, and the effect that this could have on his mental condition, the Honourable Minister said:

The Honourable Leader of the Opposition said the he had seen human beings being broken. It is not a very nice thing to see a human being being broken. I have seen it and he has seen it. The man seeking these powers must take responsibility for them. They can make or break him. . . .⁸⁴

The Honourable Minister likewise left no doubt that he regarded the measure as a very temporary one, and that he expected to be able to lift it reasonably soon:

I need the clause at this stage, and I deliberately say it -- at this stage. It may not be necessary to have it next year . . . This is the psychological moment to have this power. . . .⁸⁵

In explanation he added that he and the Police chiefs had "reason to believe that we have reached the stage where we could perhaps get to the people who are primarily responsible for the creation of this situation in South Africa."⁸⁶

The Honourable Minister added that he realised

that it will be my specific duty, my responsibility, to ensure that these powers are not abused.⁸⁷

Finally came the categorical statement:

this section will lapse as soon as there is no need for it.⁸⁸

To the eternal credit of the Honourable Minister, we know that he kept his promises. The measure was withdrawn on 11th January 1965, after all detentions under it had been terminated either through release or through indictment before the courts.

However, the history does not end there. During the next year, 1966, a new Minister of Justice introduced a Bill to combat the terrorist onslaught on, particularly, South West Africa. Inter alia provision was made for the detention of suspected terrorists, but only for a period up to 14 days, after which any further detention had to be authorized by an Order of Court. The new Minister said:

We have at least kept our sense of fairness in this Bill, because we have gone out of our way here to ensure that a person's liberty will not be interfered with lightly.⁸⁹

During the following year, the same Minister (let me say at once that he was one of the most honourable people I have known -- he has been deceased for a considerable time now) introduced the Bill which became the present Terrorism Act. Section 6 was the old 90 day-provision with the screws even tighter, inter alia, because there was now no limit of 90 days or any other period. And most important of all, the prospect of a purely temporary duration was no longer present. On the contrary, the Minister said explicitly:

I believe this legislation to be of a virtually temporary/permanent nature, because the onslaught by the terrorists has only just begun.⁹⁰

He consequently rejected an amendment which proposed annual reconsideration.⁹¹ The Minister made no attempt to hide that he was acting at the instance of the Police. He said that he

can do nothing else than to relax to a slight extent the tremendous pressure under which the Police are having to work.⁹²

His Deputy (the present Minister)* stated in the same debate that they were asking Parliament

to trust the Police in this diabolic thing we have to combat.⁹³

*James Kruger, M.P., since resigned, Ed.

As an explanation why the previous year's provision would no longer suffice, the Minister said that 14 days was often not long enough for the Police to be ready to put a prima facie case for further detention before a Judge.⁹⁴ The implication was therefore that people would be detained for longer periods without such a prima facie case. The Minister rejected opposition proposals for the extension of the 14-day period:⁹⁵ the Police must now have a power, subject only to his own directions, which he himself described as detention "for an unspecified time for questioning."⁹⁶

It is now 12 years later, and the provisions have not changed materially. Measures introduced by the present Minister for, as he put it, the reassurance of the public, are purely administrative and marginal.

Certain points stand out for thorough consideration:

- (a) The review I have given of the Roman period and the recent history in the U.S.A. clearly illustrates that processes, which originate as minor deviations from what is regarded as the true principle, tend in time to build up their own momentum and to grow larger and larger in scope. Finally the processes lead to internal corruption and decay which facilitate the task of the outside aggressor. In this way the circle is completed, and precisely the original object of the measures, being the defense of the State and the community against an onslaught which threatens their whole existence, is defeated. Can we rest assured that this danger does not exist in our case?
- (b) In particular, it appears from the local legislative history I have added that there are already signs of a momentum resulting in a considerable gap between the point of departure and where we now stand -- without its being possible to accuse anybody of dishonourable conduct. Can we rest assured that human nature is so different here from anywhere else that the further products of prolonged secrecy and lack of effective control will not ensue, or may perhaps not have ensued already?
- (c) Further to the last question, who at present accepts responsibility for the system we have? Who tries to exercise control over it? The Minister on his own, a Cabinet Committee or the whole cabinet? How thorough and searching are the attempts? On what information are they based? Who provides the information? What expert assistance is used in the system of control? Following on the recent revelations about the secret projects of the former Department of Information, it does not seem unnatural to ask these questions.

- (d) Arising from the findings on the American intelligence agencies further questions arise: What criteria are being applied in decisions concerning potential detentions? What, for example, were the criteria in the case of the bannings and detentions of 19th October 1977, which sent shock waves around the world? Is the "distinction between legal dissent and criminal conduct" being faithfully applied -- bearing in mind particularly that some of the statutory definitions of the "criminal conduct," e.g., in the Terrorism Act itself, are very widely cast?

One can carry on much further with such questions, but for the moment they are enough. The answer to most of the questions is probably that you and I simply do not know, precisely because of an absence of effective checks and balances. And this raises other considerations of public interest.

The main function of a Police force is to serve the public in a variety of ways, covering a host of everyday events in the lives of ordinary people. The South African public traditionally looks with pride and gratitude upon the quality of people the Police force has produced, the more so considering the thankless tasks which they often have to perform. There should ideally be a relationship of trust between the policeman and the ordinary law-abiding citizen; but now the police are employed to perform a semi-military task, which includes, inter alia, spying on communications between people and acting in deprivation of their liberty, all in an atmosphere of secrecy and in the absence of trusted organs of control to which the person concerned can appeal. Along this course it is inevitable that suspicions should arise and fears develop.

It is more and more becoming accepted philosophy that the different population groups in South Africa should openly and thoroughly communicate with one another in order to work out a future holding due fulfillment for all. However, there is increasing concern about how this ideal can be reached if a large part of the population lives in real fear of secret police, who are, rightly or wrongly, believed to operate a network of espionage in respect of that part of the population.

Against this background, the concern is compounded when the Minister of Justice and Police now introduces legislation which would make it impossible for the press to report on police matters without the newspapers and their reporters exposing themselves to the risk of criminal prosecution when it transpires that their information was incorrect: the practical effect must be to draw a veil over police activity, as is at present the case with the Prisons administration. The concern of the Press is not one of self-interest but of national interest.

It therefore merits serious consideration whether the existing system, with or without what is additionally planned, in any way serves the interests of the Police force itself.

Ultimately there arises for jurists the fundamental question which is contained in the classic statement on law in general by the great authority on Roman Law, Prof. Rudolph Sohm:

It regulates the relations of power within a people in accordance with the ideal of justice which resides in the community of that people, and the ultimate source of which is belief in divine justice.⁹⁷

Can it be said of the system under discussion, which is in the course of attaining semi-permanency, that it complies with this ideal of justice which resides in the community of the people? The legislative history alone, coupled with the absence of any real knowledge, suggests that in all probability the answer cannot be a positive one.

If this conclusion is correct, it follows that incisive action is needed. It must be positive: to devise a system which will contain the necessary checks and balances to serve, as far as possible, the fundamental rights and the sense of justice of the community on the one hand, together with need for effectively combating terrorism and sabotage on the other.

The endeavor should be to achieve this in a non-political way as far as possible. As in the Roman state at its peak, use should be made, on a creative and advisory basis, of the best talents in the legal profession -- of course not on its own, but in cooperation with people of all the other forms of expertise required, inter alia political science, but above all expert knowledge of the tactics and techniques of the terrorist and the saboteur and the problems attached to fighting them.

An extended form of commission inquiry seems to be indicated. Although I have in this lecture referred by way of illustration only to detention without trial, and then only in the most extreme form, an inquiry as proposed should be comprehensive so as to review all statutory provisions which provide for detention, restriction, dissolution of organizations, ban on publications and other forms of administrative encroachment on private liberties in the interests of public safety.⁹⁸

Enormously valuable assistance could be obtained from abroad, inter alia, from persons who were involved in the investigations and the setting of new guidelines in the U.S.A., as well as from persons closely associated with the developments in Israel and the implementation of its total system.

If the State does not itself take the initiative in this direction, I would contend that the legal profession should close its ranks and strongly and irresistibly insist upon it. Only then could the profession be truly worthy of the high standards of our great legal heritage.

FOOTNOTES

1. Wolfgang Kunkel (Emeritus Professor in Roman Law at the University of Munich): An Introduction to Roman Legal and Constitutional History, based on the sixth German Edition of Römisches Rechtsgeschichte, translated by J.M. Kelly (1973 Oxford/Clarendon) p. 190.
2. Campbell v. Hall (1774) I Cowper 204 on 213, 214; 98 E.R. 1045 on 1049, 1050, Verloren van Themaat, Staatsreg, (2nd Edition), pp. 51-3.
3. Van Themaat, Op. Cit., p. 129 and authorities cited there.
4. Van Themaat, Op. Cit., pp. 131-4.
5. Van Themaat, Op. Cit., p. 81 (n. 43).
6. Van Themaat, Op. Cit., p. 80.
7. Taswell-Landmead, English Constitutional History (11th Ed.) p. 95.
8. Van Themaat, Op. Cit., p. 81.
9. Kunkel, Op. Cit., pp. 48 et seq., 59 and 125; H.F. Jolowicz: Historical Introduction to the Study of Roman Law, Cambridge University Press (2nd Ed.)(1967) pp. 332-326, 374; Moses Hadas (Former Professor and Head of Department of Greek and Latin at Columbia University), Imperial Rome (Great Ages of Man Series, Time-Life International -- Nederland -- N.V., 1968) pp. 57-8.
10. Kunkel, Op. Cit., pp. 49-50.
11. Hadas, Op. Cit., p. 57.
12. Hadas, Op. Cit., p. 59.
13. Hadas, Op. Cit., p. 59.
14. Hadas, Op. Cit., p. 60.
15. Hadas, Op. Cit., p. 61.
16. Hadas, Op. Cit., p. 62.
17. Ibid.
18. Hadas, Op. Cit., p. 45-8; Kunkel, Op. Cit., pp. 105-124, 129; Jolowicz, Op. Cit., pp. 384-403.

19. Jolowicz, Op. Cit., p. 400.
20. Hadas, Op. Cit., p. 143.
21. Jolowicz, Op. Cit., p. 336.
22. Jolowicz, Op. Cit., p. 374; Kunkel, Op. Cit., pp. 51 and 127.
23. 1.5.
24. As quoted in D. 1.4.1 pr. 41.
25. Jolowicz, Op. Cit., p. 375.
26. Kunkel, Op. Cit., p. 137.
27. Jolowicz, Op. Cit., p. 436.
28. Cod. 1.17.2.18; 1.17.1 pr., Nov. 6 pr.
29. Kunkel, Op. Cit., p. 139; Jolowicz, Op. Cit., pp. 436-7; Hadas, Op. Cit., p. 144.
30. Kunkel, Op. Cit., pp. 154-5.
31. Kunkel, Op. Cit., p. 155.
32. Kunkel, Op. Cit., pp. 129, 146-7; Jolowicz, Op. Cit., pp. 471 et seq.
33. Kunkel, Op. Cit., p. 140.
34. Ibid.; Hadas, Op. Cit., pp. 145-6.
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36. Kunkel, Op. Cit., p. 145.
37. Morton H. Halperin, Jerry J. Berman, Robert L. Borosage and Christine M. Marwick, The Lawless State (Penguin Ed., 1976) p. 35.
38. Concerning the others, reference can be made to Halperin a.o., Op. Cit., Chapters 1, 2, 5, 6, 7, and 8.
39. Halperin a.o., Op. Cit., pp. 94-5; Intelligence Activities and the Rights of Americans: Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, U.S. Senate, 1976 (the Church Committee Report) pp. 3, 20, and 21.
40. Halperin a.o., Op. Cit., p. 95.
- 40a. Ibid.

41. Halperin, Op. Cit., pp. 95-96.
42. Halperin, Op. Cit., pp. 96, 97.
43. Halperin, Op. Cit., p. 101.
44. Ibid.
45. Ibid.
46. Halperin, Op. Cit., p. 102.
47. Halperin, Op. Cit., p. 111.
48. Halperin, Op. Cit., pp. 111, 112.
49. Ibid.; Church Committee, pp. 40-2.
50. Halperin, Op. Cit., p. 116-8.
51. Church Committee, p. 126.
52. Church Committee, p. 14.
53. Ibid.
54. Church Committee, p. 138.
55. Ibid.
56. Church Committee, p. 161.
57. Church Committee, p. 13.
58. Church Committee, p. 289.
59. Church Committee, p. 219.
60. Halperin, Op. Cit., pp. 61-89; Church Committee, p. 221.
61. Ibid.
62. Church Committee, p. 223.
63. Church Committee, p. 250.
64. Church Committee, pp. 165-182.
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68. Church Committee, p. 135.
69. Church Committee, p. 293.
70. Ignus Rautenbach, Aspekte van die Beskerming van Staatsveiligheid in Israel en die Republiek van Suid-Afrika, 1973 T.H.R.H.R., p. 211.
71. Prof. Amnon Rubinstein, M.K., State Security and Human Rights: The Israeli Experience (unpublished).
72. "this state of permanent war."
73. In a subsequent newspaper article (Jerusalem Post, 27.2.79) Prof. Rubinstein states, rightly or wrongly, by way of comparison with South Africa:
- The total number of acts of terror and sabotage perpetrated in South Africa in the last 25 years is roughly equal to those taking place in Israel during a normal 'quiet' month.
74. Krohn v. Minister of Defence, 1915 A.D. 191 on 196-7.
75. On 211.
76. On 202.
77. Ibid.
78. Act. No. 83 of 1967.
79. Section 17 of the General Law Amendment Act of that year.
80. Assembly Debates (hereinafter called Hansard) 1963, April 24, Col. 4657.
81. Ibid.
82. Ibid.
83. Col. 4660.
84. April 26, Col. 4853.
85. April 26, Col. 4896.
86. Col. 4854.
87. Ibid.
88. Col. 4900.
89. Hansard 1966, October 18, Col. 4642.

90. Hansard, 1967, June 2, Col. 7118.
91. Ibid.
92. Col. 7031.
93. Col. 7102.
94. Col. 7029 and 7051.
95. Col. 7051.
96. Col. 7030.
97. Sohm, Institutes of Roman Law (Translation Ledlie) Introd. 1 & 7.
98. I understand that a fairly comprehensive catalogue is contained in a relatively recent lecture delivered by the present Minister of Public Works and Tourism at a symposium on "The Rule of Law and State Security," arranged by the Institute of South African Politics of the Potchefstroomse Universiteit vir C.H.O.

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